No. 17-___

IN THE

Supreme Court of the United States

BRUCE WALKER,

Petitioner,

v.

ESTATE OF RYAN L. CLARK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ANNE BERLEMAN KEARNEY
JOSEPH D. KEARNEY
APPELLATE CONSULTING GROUP
P.O. Box 2145
Milwaukee, Wisconsin 53201

ANDREW A. JONES
Counsel of Record
CHARLES H. BOHL
KURT M. SIMATIC
HUSCH BLACKWELL LLP
555 E. Wells St., Suite 1900
Milwaukee, Wisconsin 53202
(414) 273-2100
Andrew.Jones@huschblackwell.com

Counsel for Petitioner

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QUESTIONS PRESENTED

The Seventh Circuit upheld the denial of qualified immunity to a Green Lake County jail officer on a claim that, in the context of initially booking an inmate into the jail, he violated the constitutional rights of the inmate, who later committed suicide. In determining whether the right in question was "clearly established," the court of appeals thought it sufficient that there is a right under the Eighth Amendment to be free from deliberate indifference to a risk of suicide. The case presents two questions:

(1) Whether the court of appeals defined the constitutional right in question at too high a level of generality, contrary to this Court's teachings on qualified immunity?

(2) Whether the court of appeals correctly held that *Johnson v. Jones*, 515 U.S. 304 (1995), precluded its consideration of aspects of petitioner's appeal from the denial of qualified immunity?

PARTIES TO THE PROCEEDING BELOW

The following were the parties to the appeal before the Seventh Circuit:

- Bruce Walker, a former corrections officer with the Green Lake County Jail, was an appellant;
- Tina Kuehn, a nurse and employee of a private medical services provider under contract with Green Lake County, was the other appellant; and
- The Estate of Ryan L. Clark was the appellee.

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PETITION FOR A WRIT OF CERTIORARI

Bruce Walker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1–16) is reported at 865 F.3d 544 (7th Cir. 2017). The opinion of the district court (App. 17–53) is unpublished but available at 2016 WL 4769365 (E.D. Wis. Sept. 13, 2016).

JURISDICTION

The Seventh Circuit entered judgment on July 26, 2017. *See* App. 1. The court denied petitions for panel rehearing and rehearing en banc on September 20, 2017. App. 54–55. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution, made applicable through the Fourteenth Amendment, provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1983 of Title 42 of the United States Code provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within

> the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The defense of qualified immunity exists to protect public officials from personal liability under section 1983 unless all reasonable officials in their position would know that their actions violated the law (most often, the Constitution). This Court has accordingly instructed that, to reject such a defense, a court must conclude that the defendant transgressed specific constitutional standards that have been clearly established. Here—and in two other recent cases to be presented to this Court—the Seventh Circuit has deviated from this fundamental principle. This is especially evident here, where even the *general* constitutional right claimed—the right to suicide prevention protocols—is not at all settled.

To put the issues in this petition in context, it is necessary to describe (1) the officer and the inmate involved in the primary conduct underlying this case, (2) the context in which they interacted (namely, the jail in Green Lake County, Wisconsin), (3) the process

whereby the officer booked the inmate into the jail, (4) the inmate's suicide some five days later, and (5) this lawsuit.

1. Bruce Walker and Ryan Clark. In the late morning of May 23, 2012, Ryan Clark was booked into the jail in Green Lake County, Wisconsin, for violating the terms of his extended supervision from a previous conviction. R.43 ¶ 16.[1] His estate is the plaintiff in this action and respondent here. Bruce Walker was the intake officer at the jail on May 23. *Id.* ¶ 17. He is a defendant in this action and the petitioner here. Walker knew Clark well, liked him, and got along with him. R.46-11 at 9–11, 59–60.

Walker had completed an extended training program mandated by the State of Wisconsin and was certified by the State as a corrections officer. *Id.* at 9. Walker was not a medical professional. As part of the intake process for Clark, Walker performed a security risk assessment, a basic medical assessment, and an initial suicide screening, the last of these consistent with the Suicide Prevention Policy. R.43 ¶ 24.

2. The Green Lake County Jail and the Jail's Suicide Prevention Policy. The Green Lake County Jail is a 108-bed correctional facility operated by the county. R.83 at 42. In addition to general-population cells, inmates may also be housed in (1) intake or holding cells in the booking area of the

[1] In addition to citing the attached appendix ("App."), this petition refers, where appropriate, to the record ("R.") in the district court, with specification of the docket number of the document cited. The overwhelming majority of these references are to the materials filed in connection with a motion for summary judgment. Thus, for example, "R.43" is petitioner's statement of undisputed material facts, which itself contains references to declarations, depositions, etc.

jail or (2) special needs cells elsewhere in the jail. *Id.* at 51. The holding cells are visible to all officers in the booking area: The officer stations in this area face the holding cells, with a distance of only fifteen feet between the stations and the cells. R.43 ¶ 28. Two of the three special needs cells are for medical special needs, while the third is a suicide prevention cell. R.83 at 51.

In May 2012, Green Lake County Sheriff's Office Policy No. 406.2.1 addressed suicide prevention in the jail (the "Suicide Prevention Policy"). R.43 ¶ 18. This policy directed jail staff to take precautions "to ensure that inmates are properly screened and identified as being a suicide risk." *Id.* ¶ 19. The procedure laid out by the Suicide Prevention Policy directed the intake officer to conduct an initial suicide screening and complete a "Spillman Initial Inmate Assessment" ("Spillman Assessment") of each inmate taken into custody, with an eye to determining if the inmate was, or might be, a suicide risk. *Id.* The officer was to ask a series of questions as part of the Spillman Assessment and then enter the inmate's answers into a computer program, which rates the inmate's risk for suicide. R.43 ¶¶ 24–26. In addition, the intake officer was also required to (1) observe the inmate for any visual indicators, or listen for any verbal indicators, associated with possible suicide risk; (2) review any information provided by the arresting officer; (3) review any information from any transferring agency or arresting officer; (4) ask the inmate basic questions regarding his or her history of suicide attempts, current state of mind, and medical condition; (5) review previous jail records for prior incarcerations; and

(6) ask follow-up questions and document any observations. R.46-8.

The Suicide Prevention Policy stated that "[i]f basic intake indicates that a new inmate may be a suicide risk, an in-depth suicide screening shall be completed to obtain more detailed information about the inmate's situation and to better assess his/her degree of risk." *Id.* ¶ 20. The policy did not specify who was to conduct the "in-depth" suicide screening and housing assignment. However, Walker understood that, while the intake officer conducted the initial suicide screening, jail medical staff would be responsible for the in-depth suicide screening. *Id.* ¶ 29. This was the understanding of other jail staff as well. R.46-12 at 21.

The Suicide Prevention Policy also stated that "[b]ased on the results of the . . . Inmate Assessment, as well as other information about the inmate obtained either formally or informally, an assessment will be made as to the degree of an inmate's suicide risk." R.43 ¶ 21. According to the policy, "[a]n inmate's risk assessment shall be considered when determining the inmate's classification and housing placement." *Id.* If the intake officer assessed the inmate to be a suicide risk, then he was to "be placed on 'Special Watch' status [in] a Special Needs Cell." *Id.* ¶ 22. A Special Watch requires that checks be conducted at staggered intervals at least every 15 minutes. *Id.* ¶ 23.

De Anna Lueptow, the then-administrator of the jail, testified that a corrections officer conducting prisoner intake has discretion in assessing the suicide risk of an inmate. R.83 at 102–04. Lueptow also stated that the two most important factors for an intake officer to consider when conducting an initial suicide screening are (1) if the inmate expresses a

desire imminently to commit suicide and (2) if the inmate refers to a particular method of committing suicide. *Id.* at 108; *see also* R.46-12 at 15, 18, 19, 36–37, 42.

3. Walker's Initial Suicide Risk Assessment of Clark. Walker's basic medical assessment of Clark at his booking noted that Clark's behavior did not suggest a need for an immediate referral for mental health services. R. 46-10. Clark told Walker he was taking an unspecified medication for depression, which Walker noted. *Id.* at 3. Clark also told Walker he was not under a doctor's care and that there were no other medical problems about which the jail needed to know. *Id.* at 3–4. Nor did the security risk assessment prompt any concerns about Clark. *Id.* at 1.

During his initial suicide screening of Clark, Walker noted the following, all of which he entered into the computer database: (1) Clark understood Walker's questions; (2) Clark was under the influence of alcohol; (3) Clark had received psychiatric care or been hospitalized in a mental health institution eight or nine years earlier; (4) Clark had contemplated or attempted suicide by cutting his arm seven years earlier, in 2005; and (5) Clark's cousin had attempted or committed suicide on an unspecified date. R.43 ¶ 25. In addition, however, Clark specifically informed Walker that he was not contemplating suicide. R.46-10 at 6. Based upon the above five affirmative answers (out of nineteen total questions), the Spillman Assessment program rated Clark's classification as "MAX" and a score of "5." R.43 ¶ 26. In Walker's experience with the Spillman Assessment, whenever an inmate answered that he or she had been drinking alcohol, the computer program always rated the inmate a maximum suicide risk. R.46-11 at 22–24. With that in mind, and based upon Clark's answers to his

questions, his interactions with Clark, and his knowledge of Clark, Walker did not believe that Clark was a suicide risk. *Id.* at 59–60.

After performing all three assessments (i.e., the security-risk and basic medical assessments and the initial suicide screening), Walker placed Clark in a holding cell in the booking area of the jail until the in-depth suicide screening (per the Suicide Prevention Policy) could be conducted by medical staff. R.43 ¶ 27. As noted above, this holding cell was close and visible to all officers in the booking area. *See supra* p. 4.

Walker knew that the jail medical staff would go to Clark in the holding cell and conduct a follow-up evaluation to determine any necessary precautionary actions. R.43 ¶ 29. Walker also knew that medical staff had the ultimate authority to determine Clark's housing assignment and to place Clark on a suicide watch. R.46-11 at 25. Walker left the results of Clark's Spillman Assessment, including the maximum suicide rating, in the booking area for the medical staff to consider in its follow-up assessment. *Id.* at 25–26. According to the evidence of record, this was the entirety of Walker's interactions with Clark for the duration of his incarceration.

Nurse Tina Kuehn, a defendant and appellant below, went to the holding cell to conduct a follow-up assessment of Clark about one hour after the booking. R.43 ¶ 32. She received the assessments, including the Spillman Assessment, from another officer (as Walker was not in the booking area at the time). *Id.* ¶ 33. Kuehn gave Clark a follow-up health assessment and an in-depth suicide screening pursuant to the Suicide Prevention Policy. *Id.* ¶ 32. Kuehn is a licensed registered nurse, and she has received training on suicide risk and prevention. R.46-2 at 5, 13, 23.

After her own assessments, Kuehn assigned Clark to a different cell—a medical special needs cell—because of his alcohol withdrawal. R.43 ¶ 35. Each special needs cell can be monitored by closed circuit camera. R.44 ¶¶ 12–13. Kuehn also did not believe that Clark was a suicide risk. R.43 ¶ 36. Specifically, Clark did not "display any signs of suicidal ideation" to her. *Id.* Accordingly, Kuehn did not place Clark on a Special Watch (or any other form of suicide watch) or assign him to the suicide-prevention special needs cell, and she did not inform jail staff that Clark was a risk of suicide. *Id.*

4. Clark's Subsequent Incarceration and Suicide. Kuehn saw and spoke with Clark again on the afternoon of May 23 and twice more the following day. R.46-2 at 99, 114–15, 125. These interactions did not cause her to change Clark's observation status or housing assignment. *Id.* At no time during his incarceration in the jail from May 23 to May 28 did jail staff place Clark in a general-population cell. R.43 ¶ 30. Clark remained assigned to the special needs cell because of possible alcohol withdrawal. *Id.* ¶ 37. There is no evidence that Clark displayed any suicidal tendencies during his incarceration in the jail. R.58-6 at 36. Nor did he make any requests for medical or mental health care. R.58-4.

Almost five full days after booking—at approximately 12:55 a.m. on May 28, 2012—Clark hanged himself in his cell. R.43 ¶ 51. The sergeant making her regular hourly rounds discovered him at approximately 1:45 a.m. *Id.* ¶ 52. Attempts to revive Clark were unsuccessful, and he was pronounced dead later that day. *Id.* ¶ 53.

5. This Lawsuit. On November 5, 2014, Clark's estate brought suit under 42 U.S.C. § 1983 against

(a) Walker, Steven Schoenscheck (a corrections officer on duty as the "Master Control Aide" the night of Clark's suicide), Liz Pflum (the sergeant who found Clark in his cell after his suicide), and Green Lake County (the "county defendants") and (b) Kuehn, Correctional Healthcare Companies, Inc. (Kuehn's employer), and Health Professionals Ltd. (collectively, the "medical defendants"). R.1. As is relevant here, the estate claimed that the individual defendants acted with deliberate indifference to a serious medical need on Clark's part and that the result was a failure to prevent his suicide, in violation of the Eighth Amendment. *Id.*

The county defendants moved to dismiss or, in the alternative, for summary judgment, on the basis of qualified immunity. R.42. They argued that (1) none of the individual county defendants had acted with deliberate indifference, and (2) in all events, they were entitled to qualified immunity because Clark had no "clearly established" right to different measures on his behalf. The defendants relied in part on this Court's decision in *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam). *Id.* The county defendants also argued that the estate failed to state a claim against Green Lake County. *Id.* The medical defendants later filed their own motion for summary judgment. R.70. The estate thereupon filed an amended complaint dropping Sergeant Pflum as a defendant and adding a claim against the county under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). R.76.

The district court granted summary judgment to all defendants except Walker and Kuehn (and the county). It stated as follows concerning Walker and Kuehn:

> [Plaintiff's] arguments strike close to the right defined in *Taylor* "as the right of the

> proper implementation of adequate suicide prevention protocols." If the court were to conclude that *Taylor* was squarely on point, it would necessarily conclude that no decision of the Supreme Court established the right to proper implementation of suicide screening or prevention protocols at the time of Clark's death.
>
> On the other hand, this court cannot disregard *Cavalieri* [*v. Shepard*, 321 F.3d 616 (7th Cir. 2003)], the law of this circuit, that recognizes a more general, but clearly established, right to be free from the deliberate indifference to the risk of suicide.

App. 41. The court's order did not explicitly address the *Monell* claim, stating only that Green Lake County "remains as a defendant in this case." App. 52. Walker and Kuehn appealed.

As relevant here, the Seventh Circuit affirmed the district court's denial of qualified immunity to Walker and Kuehn. With respect to Walker (petitioner here), it refused to consider his arguments under "Step 1: Violation of a Constitutional Right," such as "whether Clark's risk [of suicide] was sufficiently acute" and "whether [Walker] 'actually knew' of Clark's risk and disregarded it." App. 12. The court said "the district court's ruling on the first qualified-immunity step turns on factual questions, [and so] we do not have jurisdiction to review it" under the principle announced by *Johnson v. Jones*, 515 U.S. 304 (1995). *Id*.

On "Step 2: Clearly Established Law," the court said that it had jurisdiction to consider Walker's appeal, and it went on to define the constitutional right in

question at a very high level of generality. App. 12–13. It held that "Clark's right to be from deliberate indifference to his risk of suicide while he was in custody was clearly established at the time of his death in 2012." App. 13 (citing *Cavalieri*, 321 F.3d at 623; *Hall v. Ryan*, 957 F.2d 402, 404-05 (7th Cir. 1992)). To the argument that this right was too generalized under this Court's precedent to provide guidance to government officers such as Walker, the court of appeals responded that "there is no such problem here": "The Supreme Court has long held that prisoners have an Eighth Amendment right to treatment for their 'serious medical needs.'" App. 15 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). "Risk of suicide is a serious medical need," the court said, App. 15 (citing circuit precedent), and it characterized Walker as having "chose[n] to do nothing" (an apparent conclusion of the court itself) despite there being "sufficient evidence for a jury to find that Walker actually knew about Clark's serious risk of suicide." App. 15–16. The court maintained that its "precedent establishes that 'particular conduct' such as this violates clearly established law." *Id*.

In reaching this conclusion, the court of appeals did not cite a single case, from this Court, its own jurisprudence, or another circuit, that addressed an Eighth Amendment claim brought against a corrections officer under similar circumstances. Indeed, it apparently thought any such analysis to be inappropriate, saying this: "To the extent Walker argues that our prior cases are factually distinguishable from this case, our limited jurisdiction precludes considering that argument." App. 16.

The court denied Walker's and Kuehn's petitions for rehearing or rehearing en banc. App. 54–55.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT FLOUTED THIS COURT'S QUALIFIED-IMMUNITY PRECEDENT BY DEFINING THE CONSTITUTIONAL RIGHT IN QUESTION AT TOO HIGH A LEVEL OF GENERALITY RATHER THAN IN LIGHT OF THE SPECIFIC FACTS AND CIRCUMSTANCES CONFRONTING PETITIONER.

A. This Court Has Emphasized That Courts Considering Qualified-Immunity Defenses Must Consider Whether a Reasonable Official Would Have Known That His Conduct Violated the Law.

"Public officials are immune from suit under 42 U.S.C. § 1983 unless they have 'violated a statutory or constitutional right that was *clearly established* at the time of the challenged conduct.'" *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (emphasis added, quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014)). Such qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam) (internal quotation marks omitted). "[The] 'clearly established' standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can 'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)) (internal quotation marks omitted).

The doctrine is important. This is certainly so for the defendants entitled to it: As an immunity from suit, qualified immunity "'is effectively lost if a case is erroneously permitted to go to trial.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). But it is also is important "to society as a whole." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Perhaps for this reason, this Court has not hesitated to set aside judgments of lower courts when they improperly deny qualified immunity to public officials. *See Sheehan*, 135 S. Ct. at 1774 n.3 (citing five examples from 2012, 2013, and 2014 alone).

These cases and principles have elaborated upon this Court's caution, thirty years ago, against applying "the test of 'clearly established law' . . . at [a high] level of generality." *Anderson*, 483 U.S. at 639. Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*; *see also Reichle*, 566 U.S. at 665 (observing that, stated as "a broad general proposition," any constitutional right would be clearly established) (internal quotation marks omitted). Accordingly, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson*, 483 U.S. at 640. This is "so that the 'contours' of the right are clear to a reasonable official." *Reichle*, 566 U.S. at 665 (quoting *Anderson*, 483 U.S. at 640).

The recent cases accordingly have emphasized to the lower courts that overgeneralized statements of constitutional rights will not suffice under the standard enunciated in *Anderson*. Rather, to be clearly

established, a right must be "one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted). This does not mean that a prior case exactly on point is required. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). However, "existing precedent [must have] placed the statutory or constitutional question beyond debate." *Sheehan*, 135 S. Ct. at 1774 (quoting *al-Kidd*, 563 U.S. at 741). More precisely or practically, "[a]n officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it.'" *Id.* (quoting *Plumhoff*, 134 S. Ct. at 2023); *see also Saucier v. Katz*, 533 U.S. 194, 216 n.6 (2001) (Ginsburg, J., concurring in judgment) ("'[I]n close cases, a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently.'") (quoting *Roy v. Inhabitants of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994)).

This Court's recent applications of this principle—reversing four different federal courts of appeals for their failure to examine whether a right was clearly established in a particularized sense—involved different circumstances but are highly instructive here. In *Sheehan*, respondent was a mentally disturbed and armed group-home resident who sued police for allegedly violating her Fourth Amendment right to be free from excessive force. Denying qualified immunity, the Ninth Circuit held it to be clearly established that an officer cannot "forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when

there was no objective need for immediate entry." *Sheehan*, 135 S. Ct. at 1772 (internal quotation marks omitted). In reversing, this Court explained that "[t]he Ninth Circuit focused on *Graham v. Connor,* 490 U.S. 386 (1989)," but *Graham*'s holding—"only that the 'objective reasonableness' test applies to excessive-force claims under the Fourth Amendment"—"is far too general a proposition to control this case." *Sheehan*, 135 S. Ct. at 1775. The Court also distinguished two Ninth Circuit precedents involving officers' use of force.

The Court explained that these various precedents had not "placed the statutory or constitutional question beyond debate" and explained the level of particularity required:

> When *Graham* [and the two Ninth Circuit cases] are viewed together, the central error in the Ninth Circuit's reasoning is apparent. The panel majority concluded that these three cases "would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry." 743 F.3d at 1229. But even assuming that is true, *no precedent clearly established that there was not "an objective need for immediate entry" here.* No matter how carefully a reasonable officer read *Graham* [and the two Ninth Circuit cases] beforehand, that officer could not know that reopening Sheehan's door to prevent her from escaping or gathering more weapons would violate the Ninth Circuit's test, even if all the disputed facts are viewed in respondent's favor.

Id. at 1777. "Without that 'fair notice,' an officer is entitled to qualified immunity." *Id.*

More recently yet: In *Mullenix*, this Court confronted a refusal to afford qualified immunity on an excessive-force claim involving a trooper who responded to a fleeing suspect and a high-speed pursuit because (in the Fifth Circuit's estimation) "'the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment.'" 136 S. Ct. at 308 (quoting 773 F.3d 712, 725 (5th Cir. 2014)). As it had in *Sheehan*, the Court in *Mullenix* rejected this formulation: "We have repeatedly told courts . . . not to define clearly established law at a high level of generality." *Id.* (internal quotation marks omitted). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Id.* (quoting *al-Kidd*, 563 U.S. at 742).

According to the Court in *Mullenix*, if the legal question at issue "is one in which the result depends very much on the facts of each case," then a public official is entitled to immunity if "[n]one of [the applicable case law] *squarely governs* the case." *Id.* at 309 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). When circumstances "fall somewhere between . . . two sets of cases," qualified immunity applies, as the doctrine "protects actions at the 'hazy border between [impermissible and permissible conduct].'" *Id.* at 312 (quoting *Brosseau*, 543 U.S. at 201).

Just last Term, in *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam), this Court decided another excessive-force case, this one involving an officer who "arrived late at an ongoing police action" and witnessed several shots being fired before shooting and

killing an armed individual without first giving a warning. *Id*. at 549. The lower courts thought qualified immunity inappropriate, on the theory that it was clearly established that the Fourth Amendment's reasonableness principle required the officer to give a warning. *Id.* at 550–51. In reversing, this Court rejected the Tenth Circuit's formulation of the right at issue: "[I]t is again necessary to reiterate the longstanding principle that 'clearly established law' should not be 'defined at a high level of generality.'" *Id.* at 552 (quoting *al-Kidd*, 563 U.S. at 742). The court of appeals "failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." *Id.*

B. This Court Has Emphasized the Importance of Correctly Assessing "Clearly Established" Law in the Very Context of Suicide Risk of Inmates.

This Court required such particularity in *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam), where the claim, like that against petitioner here, involved suicide risk assessment and prevention protocols. The Court held that the Third Circuit had misapprehended the way the qualified-immunity doctrine works.

In *Taylor*, upon Barkes's arrest for violating probation, a nurse at the jail conducted a medical evaluation, designed in part to assess whether inmates were suicidal. "The nurse gave Barkes a 'routine' referral to mental health services and did not initiate any special suicide prevention measures." *Id.* at 2043. Barkes was placed in a cell by himself, and the next morning correctional officers discovered that he had hanged himself with a sheet. *Id.* Upholding the denial of qualified immunity and looking to its own precedent,

the Third Circuit concluded that the right at issue was best defined as an incarcerated person's "'right to the proper implementation of adequate suicide prevention protocols.'" *Id.* at 2044 (quoting *Barkes v. First Corr. Med., Inc.*, 766 F.3d 307, 327 (3d Cir. 2014)).

This Court summarily reversed. It began with this pertinent observation: "No decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols. No decision of this Court even discusses suicide screening or prevention protocols." *Id.* Further, no such right had been established in the lower courts: "'[T]o the extent that a 'robust consensus of cases of persuasive authority' in the Courts of Appeals 'could itself clearly establish the federal right respondent alleges,' the weight of that authority at the time of Barkes's death suggested that such a right did *not* exist." *Id*. (quoting *Sheehan*, 135 S. Ct. at 1778) (citation and internal quotation marks omitted). After discussing such authority and also distinguishing various Third Circuit precedents, the Court found the conclusion sufficiently compelling to warrant reversal: "Because, at the very least, petitioners were not contravening clearly established law, they are entitled to qualified immunity." *Id*. at 2045.

C. The Seventh Circuit Ignored This Court's Teachings by Defining the Right in Question at Too High a Level of Generality.

Against this backdrop, it is clear that the Seventh Circuit in this case applied the clearly-established-law component of the qualified-immunity doctrine at too high a level of generality. Its approach of defining the relevant law simply (i.e., generally) as the right to be free from deliberate indifference to the risk of suicide is exactly analogous to the approach that this Court

declared to be improper in *Sheehan*, *Mullenix*, *White,* and *Taylor*.

To be sure, in various words in its opinion, the Seventh Circuit said some of the right things. For instance, it noted that "[c]ourts may not define clearly established law at a high level of generality." App. 15 (citing *Sheehan*, 135 S. Ct. at 1775–76). The court further observed that, for a particular right to be clearly established, "'existing precedent must have placed the . . . constitutional question beyond debate.'" App. 13 (quoting *al-Kidd*, 563 U.S. at 741).

But in affirming the district court's denial of immunity to petitioner Bruce Walker, the Seventh Circuit failed to put these principles into practice. Rather, the court defined the right in question only at a very high level of generality. It characterized its previous cases as having established that those in custody such as Clark have a "right to be free from deliberate indifference to [the] risk of suicide" under the Eighth Amendment. *Id.* The court rejected the argument that this characterization of the right was insufficiently specific under this Court's precedents to have made clear to Walker that he was proceeding unlawfully.

This approach simply cannot be squared with the sort of analysis that this Court modeled in *Sheehan*, *Mullenix*, and *White*.[2] The court of appeals did not

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[2] The court of appeals sought to avoid the force of these precedents in part by characterizing Walker as having "chose[n] to do nothing." App. 16. Even viewed in the light most favorable to respondent (and quite apart from the fact that the suicide occurred more than four days after Walker's interaction with Clark), the evidence does not support that characterization. *See supra* pp. 6–8.

engage in the type of particularized analysis, based on the facts and circumstances confronting Walker, that this Court requires. Like the court of appeals in *Mullenix*, the Seventh Circuit here did not analyze the qualified-immunity issue in light of the specific context of this case, but rather as a broad, general proposition. Like the court of appeals in *White*, it did not cite a single case—from this Court or any court of appeals—that addressed an Eighth Amendment claim brought in similar circumstances, let alone one that would have made clear to petitioner that his conduct was unconstitutional (or, to put the point contextually, that it was deliberately indifferent). That is, the Seventh Circuit pointed to no law that would have given fair warning to Walker, or other corrections officers or public officials in a similar situation and with the information confronting him, that he was violating the Constitution.[3]

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[3] The court of appeals seems to have had limited interest in reviewing past precedents, even at one point making the erroneous assertion that it had no jurisdiction to do so. In its opinion, the court recited that under *Johnson v. Jones*, 515 U.S. 304 (1995), its jurisdiction in a qualified-immunity appeal does not include "'whether [there is] a "genuine" issue of fact for trial.'" App. 8 (quoting 515 U.S. at 319–20). We may leave aside until Part III of this petition whether it correctly applied that principle to reject certain arguments going to whether any constitutional rights were violated ("Step 1"). App. 11–12. The point here is that the court somehow thought *Johnson* also to limit its work under "Step 2: Clearly Established Law," even though it had already acknowledged that "[w]e do have jurisdiction to review th[is] . . . step." App. 12.

Specifically, to conclude its "clearly established" analysis (indeed, its opinion), the court stated that its "limited jurisdiction precludes considering" Walker's argument "that our prior cases are factually distinguishable from this case." App. 16; *see* App. 8 (making clear that reference to "limited jurisdiction" is to

Yet it is *Taylor* that reveals more specifically, even precisely, the incorrectness of the Seventh Circuit's decision. The court of appeals dismissed "*Taylor* [as] readily distinguishable from this case." App. 14. To be sure, *Taylor* involved supervisory officials, not corrections officers or nurses with first-hand experience. But, in fact, *Taylor* can be used, very particularly, to show that the Seventh Circuit was incorrect in its suggestion that while "the right at issue [i.e., the right to be free from deliberate indifference to suicide] was not clearly established in the Third Circuit" [given *Taylor*], it "*has* long been clearly established in this circuit." App. 15 (emphasis added).

Consider, in this regard, that for this proposition the Seventh Circuit maintained that the right in question here was established even as long ago as *1986*, citing *Hall v. Ryan*, 957 F.2d 402 (7th Cir. 1992), and pointing to a footnote there "collecting cases from

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Johnson). This is wrong—and importantly so. It simply cannot be squared with this Court's instructions—and actions—in *Sheehan*, *White*, *Taylor*, and *Mullenix*. Those decisions were *all about* whether prior cases were, in relevant and material ways, "factually distinguishable from th[e] case" before this Court. *See*, *e.g.*, *White*, 137 S. Ct. at 552 (explaining that "[t]he panel majority misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under *similar circumstances* as [White] was held to have violated the Fourth Amendment" and reviewing facts of prior cases to demonstrate this) (emphasis added). This approach is longstanding. *See*, *e.g.*, *Brosseau*, 543 U.S. at 201 (detailing the facts of various cases, concluding that "[n]one of them squarely governs the case here," and holding, *therefore*, that "[t]he cases by no means 'clearly establish'" the asserted right).

This mistaken conception of the task at hand underscores just how little affinity the Seventh Circuit seems to have had for the recent models from this Court of how to assess for qualified-immunity purposes whether a right is clearly established.

other circuits." App. 13. One of those circuits, *see* 957 F.2d at 406 n.6, was the *Third* Circuit—the very circuit in which this Court has already authoritatively declared (and the Seventh Circuit has conceded) the right to be free from deliberate indifference to suicide *not* to have been established as late as 1991 or even as late as 2004 (the relevant dates in *Taylor* itself). And three of the other circuits cited in its 1992 footnote in *Hall* (relied upon by the Seventh Circuit here) were the very courts that *this* Court cited in *Taylor* for the proposition that "the weight of th[e] authority at the time of Barkes's death suggested that such a right did *not* exist." *Taylor*, 135 S. Ct. at 2044. *Compare id*. at 2045 (citing decisions from the Fourth, Fifth, Sixth, and Eleventh Circuits), *with Hall*, 957 F.2d at 406 n.6 (citing cases from three of these circuits, among others). In short, the Seventh Circuit's analysis here is *directly* contrary to this Court's analysis in *Taylor*.

To return to larger principles, it is not too much to say that the approach of the court of appeals here flies in the face of the foundational principles on which the qualified-immunity doctrine stands. It is fundamentally inconsistent with the doctrine's stated purpose—protecting public officials from personal liability unless they are plainly incompetent or knowingly violate the law—to second-guess the real-time judgments that Walker made in the booking process based on Clark's answers to questions, Walker's knowledge of Clark, and Walker's own observations of Clark. Based on the information that he had at the time of booking, Walker did not believe that Clark posed an imminent and substantial risk of suicide. Nonetheless, Walker put Clark in a holding cell until he could be assessed again by the jail nurse, who determined housing assignments, and Walker passed along his assessment of Clark to her. Judged from the correct perspective,

Walker's belief and actions were reasonable, and, if they were not, such a conclusion certainly was not beyond debate.

D. The Seventh Circuit's Disregard for Controlling Qualified-Immunity Precedent Extends Beyond This Case.

The problem presented by the Seventh Circuit's approach to qualified immunity is immediate and dramatic for petitioner. Walker—the intake officer who during booking did not believe Clark to be an imminent suicide risk—has been denied the immunity from suit granted him by law and will be forced to proceed to trial.

But the problem presented by the Seventh Circuit's improper approach to qualified immunity is not limited to this case or panel. Petitions for certiorari are being filed with this Court in two other recent cases in which the court of appeals approached the qualified-immunity doctrine just as it did here. *Orlowski v. Milwaukee County*, 872 F.3d 417 (7th Cir. 2017), and *Estate of Perry v. Wenzel*, 872 F.3d 439 (7th Cir. 2017), involve different claims, but in each instance the Seventh Circuit denied qualified immunity without identifying a single precedent where a defendant involved in the corrections system faced circumstances similar to those confronting the defendants in those cases.

Absent review by this Court, the flawed approach employed by the Seventh Circuit threatens the protections afforded by the qualified-immunity doctrine for corrections officers throughout the circuit.

II. IF THE DEFENSE IS ASSESSED AT THE APPROPRIATE LEVEL OF SPECIFICITY, QUALIFIED IMMUNITY IS AVAILABLE TO PETITIONER.

If Walker's qualified-immunity defense is properly assessed at the level of specificity required by this Court, he is entitled to immunity.

To begin with the standard: As with all claims under section 1983, negligence alone is categorically insufficient to state a cause of action. *See, e.g.*, *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 848–49 (1998); *Davidson v. Cannon*, 474 U.S. 344, 347–48 (1986). Rather, because Clark was brought to the jail for violating the conditions of his extended supervision, both the district court and the Seventh Circuit properly considered his section 1983 claim under the Eighth Amendment, whose standard is deliberate indifference. *See, e.g.*, *Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005). In the context of suicide, a plaintiff must show that there was a significant likelihood that the person in custody would imminently seek to take his life, and the defendant official must be shown to have intentionally disregarded that likelihood with action (or inaction) the equivalent of criminal recklessness. *Collins v. Seeman*, 462 F.3d 757, 761 (7th Cir. 2006).

Thus, framed properly in light of the specific facts and circumstances confronting Walker at the time of Clark's booking into the jail, the question in this case is whether it was clearly established to be deliberately indifferent for Walker to place Clark in a holding cell in the general booking area, simply because of the results of a computerized intake assessment—and despite the facts that Clark displayed no outward signs of suicidal ideation and that Walker knew

trained medical personnel would shortly conduct a follow-up assessment and ultimately determine Clark's proper observation and housing status. All of this is to leave aside that Kuehn in fact changed Clark's cell placement to one of the special needs cells (though not to the one that was a suicide prevention cell) and that Clark did not commit suicide until almost five days later.

Neither Clark nor the court of appeals identified any decisions (let alone controlling case law) putting Walker on clear and unambiguous notice that his actions were constitutionally insufficient. The two Seventh Circuit cases relied upon by the court of appeals for the proposition that it has long been established that an inmate has a right to be free from deliberate indifference to suicide are unavailing. If any reasonable officer were to read *Cavalieri* and *Hall*, he or she would not know that Walker's actions with respect to Clark would violate the court's test for deliberate indifference to suicide. In *Cavalieri*, the inmate threatened suicide and violence immediately before his incarceration, his mother expressed to an officer that he threatened suicide if he was ever incarcerated again, and the officer did not communicate the threat of suicide to anyone at the jail. 321 F.3d at 618–20. In *Hall*, the inmate's behavior was belligerent and bizarre, and he had been engaged in a high-profile suicide attempt nine months earlier, which was handled by the same police department—nonetheless, officers took no steps to provide the inmate any assistance or maintain continuous monitoring of him. 957 F.2d at 402–04. And neither Clark nor the panel cited other applicable precedent that would have put Walker on notice that it was beyond debate that his actions violated a clearly established right.

Here, the undisputed facts demonstrate that during Clark's booking into the jail, Walker considered his personal knowledge of Clark, Clark's answers to the Spillman Assessment questions, and Walker's own experience with the Spillman Assessment rating system. Based on all of this information, Walker did not believe that Clark was an imminent risk of suicide at the time of his booking. Walker did not ignore or otherwise turn a blind eye to what he knew and observed. In fact, Walker took specific, affirmative actions under the discretion he was afforded: Walker placed Clark by himself in a highly visible holding cell in the booking area until he could be assessed by the jail nurse to determine his observation level and housing assignment. Moreover, Walker left the results of the Spillman Assessment for the jail nurse in the booking area for the nurse to review in her in-depth assessment of Clark.

Walker's actions are not to be judged against what 20/20 hindsight reveals might have been more-effective actions. So while, in retrospect, it might have aided Clark if Walker had put him on suicide watch in a suicide prevention cell, the Eighth Amendment does not demand perfection or even reasonableness.

The qualified-immunity doctrine provides protection to Walker for any mistakes he made here in booking Clark. *Compare Sheehan*, 135 S. Ct. at 1775 (observing that immunity applies even when, "with the benefit of hindsight, the officers may have made 'some mistakes'") (quoting *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014)). It simply cannot be maintained that all corrections officers in Walker's shoes would have known that to proceed as petitioner did was to act with deliberate indifference. *See Sheehan*, 135 S. Ct. at 1774. Even if the facts are

viewed most favorably to respondent, in no sense did the law give petitioner fair and clear warning that his conduct fell below constitutional expectations or placed the matter beyond debate. *See id.*; *White*, 137 S. Ct. at 552. Qualified immunity thus protects petitioner from suit.

III. THE SEVENTH CIRCUIT ERRONEOUSLY CONCLUDED THAT IT DID NOT HAVE JURISDICTION OVER THE ENTIRETY OF CLARK'S ARGUMENT THAT HE WAS IMPROPERLY DENIED QUALIFIED IMMUNITY.

The Seventh Circuit ruled at the start of its analysis that it could not "review all of the issues briefed by Walker . . . including whether the district court erred by denying [his] motion for summary judgment on the merits of the deliberate indifference claim," based on the principle of *Johnson v. Jones*, 515 U.S. 304 (1995). App. 8–9; *see supra* p. 10. In particular, under "Step 1" of the qualified-immunity analysis, in which the court assessed whether there was a "violation of a constitutional right," it stated that "whether Clark's risk [of suicide] was sufficiently acute" and "whether [Walker] 'actually knew' of Clark's risk and disregarded it" were "disputes [that] are factual in nature," and thus held Walker's argument that he had not violated a constitutional right to be outside the limits of appellate review. App. 12.

This reading of *Johnson* is incorrect and deprived petitioner of his full appellate review under 28 U.S.C. § 1291. It is, of course, the case under *Johnson* that certain disputes may not be taken up by a court of appeals in reviewing a denial of qualified immunity: "[A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary

judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 515 U.S. at 319-20. In *Johnson*, the "genuine issue of fact" over which the appellate court had no jurisdiction involved who committed the alleged violations—specifically, "whether petitioners participated in (or were present at) a beating." *Id*. at 318.

Johnson thus concerns disputes over "historical facts," as the dissent from an en banc opinion of the Seventh Circuit recently explained. *See Stinson v. Gauger*, 868 F.3d 516, 529 (7th Cir. 2017) (Sykes, J., dissenting), *petitions for cert. pending*, Nos. 17-721, 17-749, 17-788. In *Stinson*, the court of appeals determined that, under *Johnson*, it did not have jurisdiction over an appeal from a denial of qualified immunity where facts and inferences from the record were in dispute. The dissent explained that the issues on appeal did not concern "disputed question[s] of *historical* fact"—i.e., they did not involve the "'who, what, where, when, and how' of the case." *Id*. at 530, 532 (Sykes, J., dissenting) (emphasis added). Thus, review should have been available: "The *Johnson* bar does not apply if the appeal asks whether the evidence in the summary-judgment record—construed in the plaintiff's favor—would permit a reasonable jury to find that the defendant committed the claimed constitutional violation . . . ." *Id*. at 532 (Sykes, J., dissenting).

That is precisely what Walker's appeal asked under "Step 1" of the qualified-immunity analysis. Walker was maintaining that in fact he had not "committed the claimed constitutional violation." *Compare id. with* App. 12. The *historical* facts—such matters as whether Clark was drunk at booking (yes), whether the Spillman Assessment was administered (yes), and

what the actual results of the Spillman Assessment were (see the Statement of the Case above)—would not have been reviewable by the court of appeals because of *Johnson*, but these were not disputed. By contrast, what the Seventh Circuit stated to be unavailable for review involved the facts and inferences bound up in the questions of law whether there was a serious medical condition that posed a substantial risk requiring action or whether Walker's actions amounted to deliberate indifference. This denial of review was improper under *Johnson* and deprived Walker of full appellate review of the denial of qualified immunity by the district court.

At a minimum, if the Court does not grant certiorari with respect to question one in this petition but grants certiorari in *Stinson*, it should hold this case (because of question two) pending its decision in *Stinson*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANNE BERLEMAN KEARNEY
JOSEPH D. KEARNEY
APPELLATE CONSULTING GROUP
P.O. Box 2145
Milwaukee, Wisconsin 53201

ANDREW A. JONES
Counsel of Record
CHARLES H. BOHL
KURT M. SIMATIC
HUSCH BLACKWELL LLP
555 E. Wells St., Suite 1900
Milwaukee, Wisconsin 53202
(414) 273-2100
Andrew.Jones@huschblackwell.com

Counsel for Petitioners

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